United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

75-1284

B P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH BONACORSA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN
Attorneys for Defendant-Appellant
232 West End Avenue
New York, N. Y. 10023

(4956B)

I N D E X

I N D E X

I N D E X

TABLE OF CASES

I N D E X

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1284

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH BONACORSA,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Whether the evidence was sufficient to establish that Joseph Bonacorsa was not the actual owner of the horse Joli Timmy.

2. Whether the evidence was sufficient to establish that Joseph Bonacorsa knowingly gave false testimony before the Grand Jury in view of the truthfulness of his answers under his reasonable interpretation of the ambiguous questions asked, and

the failure of the questioner to ask a single question which focused directly on the matter in issue.

3. Whether the testimony of Steve Rubin was sufficient to establish beyond a reasonable doubt that Joseph Bonacorsa corruptly endeavored to obstruct the administration of justice, and whether the variance between pleading and proof of the obstruction of justice deprived Joseph Bonacorsa of the right to be tried upon a Grand Jury indictment.

4. Whether Joseph Bonacorsa was denied a fair trial as a result of:

a. The striking of all of the testimony of Martin Lentsch;

b. The striking of the testimony of Matthew Lentsch and the instruction which the trial court gave the jury concerning the limited purpose for which it could consider his testimony when he was recalled as a witness;

c. The manner in which the trial judge participated in the examination of both defense witnesses;

d. The exclusion of the ownership registration of the horse Joli Timmy from evidence after the jury requested it during its deliberations;

e. The jury inadvertently receiving the original indictment and the superseding indictment during its deliberations;

f. The failure of the trial court to answer the jury's question regarding the perjury count of the indictment.

5. Whether the conviction must be reversed and the

indictment dismissed because Joseph Bonacorsa was examined at a deposition and called as a grand jury witness for the purpose of obtaining evidence against him after the decision to indict him had been formally made by the government, without his being appraised of that fact.

6. Whether the following conduct of the prosecutor tainted the proceedings and deprived appellant of due process of law:

a. Repeated use of improper, leading questions during examination of the chief prosecution witness, Steve Rubin, on the most critical factual issues in the case;

b. Misstatement of the record during the government's opening statement, and repeated misstatements of the record and other improper and prejudicial remarks during summation.

STATEMENT OF THE CASE

Preliminary Statement

This appeal is from a judgment of conviction entered on July 3, 1975 in the United States District Court for the Eastern District of New York (Platt, J.), following a jury trial at which Joseph Bonacorsa was convicted of one count of making a false declaration to a grand jury in violation of 18 U.S.C. § 1623, and one count of obstruction of justice in violation of 18 U.S.C. § 1503. Concurrent sentences of two years' imprisonment, with four months to be served and the remainder suspended,

and three years probation, were imposed on each count, plus a total fine of $2,000.

A memorandum and order, supplemental memorandum and order, and amended supplemental memorandum and order denying Joseph Bonacorsa's written motion for a judgment of acquittal or a new trial, are set forth at A-270, A-283, A-290, respectively.[1/]

The Defendant

Joseph Bonacorsa has lived, with his wife and four children, in the same Long Island home for 29 years. He has been involved in harness racing, as a driver, trainer and owner, for most of his adult life. Prior to December 19, 1973, the date the indictment was returned in this case, he had never been arrested or accused of any crime.

Nature of the Charges

In 1973, a special grand jury was conducting an investigation of the harness racing industry in the New York Metropolitan Area.[2/] Pursuant to that investigation, Joseph Bonacorsa was subpoenaed as a witness. He appeared before the grand jury on three different occasions: June 11, 1973; September 14, 1973;

1/ "A-" refers to pages of Appellant's Appendix.

2/ The investigation culminated in an indictment charging 28 individuals with violations of 18 U.S.C. § 224 (sports bribery). Joseph Bonacorsa was not among them.

and December 19, 1973. In addition, on December 17, 1973, he submitted to an oral deposition at the Brooklyn Strike Force Office which was later adopted before the grand jury.

The indictment consists of three counts. Count I alleges perjury before the grand jury, and Counts II and III allege obstruction of justice.

The charges against Joseph Bonacorsa are based upon alleged "hidden ownership" of a race horse. Essentially, the government contended that a horse known as Joli Timmy, although officially registered in Bonacorsa's wife's name, was actually owned by Forrest Gerry, Jr. Mr. Bonacorsa allegedly testified falsely when he denied this "hidden ownership" before the grand jury, and allegedly obstructed justice when he told a potential witness, Steve Rubin, that he was the actual owner of Joli Timmy.

The Trial

The trial was held on five days in November, 1974. The court charged the jury on the morning of the fourth day, and a verdict of guilty on Counts I and III, and not guilty on Count II, was returned at approximately noon on the fifth day.

The government called a total of four witnesses: Ralph Wilkinson, foreman of the grand jury (Tr. 18-33)[3/]; Robert Luehrman, registrar of the United States Trotting Association (Tr. 35-36); Steve Rubin, trainer and "partner" in the horse

---

3/ "Tr." refers to pages of trial transcript.

Joli Timmy prior to its transfer to Mary Bonacorsa (Tr. 56-254); and Richard Schweitzer, the registered co-owner of Joli Timmy prior to its transfer to Mary Bonacorsa (Tr. 254-284).

The defense called two witnesses: Martin Lentsch, a resident of Indiana, and licensed owner of race horses in Illinois (Tr. 292-327); and Matthew Lentsch, Martin's son, an apprentice to Joseph Bonacorsa at the time Joli Timmy was transferred to Mary Bonacorsa, and the registered owner of Joli Timmy immediately after Mary Bonacorsa (Tr. 328-395).

The Sale of Joli Timmy

In February, 1973, Leonard and Richard Schweitzer were the registered owners of Joli Timmy (Tr. 39). Steve Rubin, their trainer and "partner" (Tr. 58-59), advised them to sell the horse because it had developed a sore leg (Tr. 61). Rubin then negotiated a sale with Forrest Gerry, Jr. (Tr. 61), who was acting as broker on behalf of a New Zealand interest (Tr. 64; 177; 191-192)[4/]. A verbal agreement was reached (Tr. 257), whereby the Schweitzers would receive $3,500, to be paid through an interbank deposit (Tr. 62-64), plus an option to purchase a New Zealand horse for $7,500 (Tr. 261). It was further agreed that the Schweitzers would have full use of the New Zealand horse for a one-month trial period before deciding whether or not to exercise the option (Tr. 63; 261).

4/ Gerry was not licensed to race horses, but he was permitted to buy and sell them (Tr. 28). He did this quite often, acting as a broker for many of the drivers, trainers and owners at the harness tracks (28).

The New Zealand horse was delivered to the Schweitzers. However, it turned out to be "a disaster" and was returned a few days later (Tr. 63; 261). The $3,500 was never deposited in the Schweitzers' bank account, and the New Zealand deal apparently fell through (Tr. 64).

Thereafter, Joli Timmy was still considered "verbally sold" but remained in Schweitzer's possession since no payment had been made. After a period of delay, Gerry eventually went to Schweitzer's New York office and gave him a cash payment of $1,000 (Tr. 257-258). On about February 23, 1973, Gerry paid the remainder of the $3,500 selling price to Steve Rubin, in cash, at Yonkers Raceway (Tr. 65-66). There was no evidence as to the source of this money, or in whose behalf Gerry was then acting.

The day after this payment was made, Rubin delivered the horse and its registration papers to Joseph Bonacorsa at Yonkers Raceway (Tr. 126-127). Sometime thereafter, he gave Mr. Bonacorsa a bill of sale for the horse in the amount of $4,000, which was signed "Richard Schweitzer", and which named Mary Bonacorsa as the purchaser (A-242).[5/] Mary Bonacorsa became the registered owner of the horse (Tr. 46), and it was thereafter raced under her name (Tr. 378-382).

5/ The testimony was conflicting as to the date the bill of sale was given to Joseph Bonacorsa. It is dated February 16, 1973, and Matthew Lentsch testified that he saw it about a week after the sale (Tr. 383). During his October 15, 1973 grand jury testimony, Rubin stated that the bill of sale was given to Bonacorsa "a couple of weeks" after the sale (A-225) and during an FBI interview that same day, he stated it was "very shortly after" the sale (A-219). However, at trial, he testified that he gave it to Bonacorsa in September, 1973 (Tr. 182).

In September, 1973, the ownership of Joli Timmy was transferred from Mary Bonacorsa to Matthew Lentsch (Tr. 47).

The Selling Price of Joli Timmy

Both Richard Schweitzer and Steve Rubin testified that the selling price of Joli Timmy was $3,500 (Tr. 255; 62). Matthew Lentsch testified that he gave Joseph Bonacorsa $4,000 to purchase the horse (Tr. 388), and the bill of sale also states that the price was $4,000 (A-242).

During direct examination Rubin was asked to explain why the bill of sale was made out for $4,000 if the actual selling price was $3,500.

Q Why $4000?

A Well, before I sold the horse to Gerry there was another party interested in the horse and I wanted it to be known to the other party that they would have bought it for the 3500 so I just wanted that other party to know that I had sold it for more than 35. (Tr. 140-141)

On October 15, 1973, Rubin told FBI agents the following concerning the bill of sale:

> The bill of sale was made out for $4,000 because RUBIN stated that because he paid $12,500 for the horse he did not want FILION's people to know he sold it for less than $4,000. (A-219)

Alleged Statements of Joseph Bonacorsa

In addition to the above evidence concerning the sale of Joli Timmy in February, 1973, the government introduced testimony of certain statements allegedly made by Joseph Bonacorsa

on three occasions. In each instance the alleged statements were made to Steve Rubin, in the presence of no other person, and were introduced at trial solely through the uncorroborated testimony of Rubin.

The first conversation allegedly occurred at the time Rubin delivered Joli Timmy and the registration papers to Bonacorsa on February 24, 1973.[6] The testimony is as follows:

> THE COURT: Tell the jury what you said to him and what he said to you from the first words when you got there to when he left.
>
> THE WITNESS: Well, I had given him the horse. I gave him the horse at the time. This was the next day, and I also gave him the papers. When I gave him the papers I told him to give it to Forrest Gerry. He acknowledged the fact that he would see that Forrest Gerry got it.
>
> MR. CASTELLANO: I object to that characterization.
>
> THE COURT: Overruled. He said what?
>
> THE WITNESS: He acknowledged --
>
> THE COURT: Tell us in substance what he said.
>
> THE WITNESS: I told him, I said, these are the papers for Gerry and he said that he would see that Gerry got the papers (Tr. 127-128)

The second statement allegedly occurred at the time Rubin gave Bonacorsa the bill of sale (Tr. 138), and the third when Rubin "accidentally" came across Bonacorsa on the training track at Roosevelt Raceway (Tr. 141). These two incidents are the basis of the obstruction of justice charged in Counts II and III of the indictment. Essentially, Bonacorsa allegedly told

---

[6] In his grand jury testimony of October 15, 1973, Rubin stated that he gave the papers to Gerry, and that Gerry gave them to Bonacorsa (A-225). Accordingly, there would have been no opportunity at all for this conversation.

Rubin, on each occasion, that "if anyone asked" the horse (Joli Timmy) belonged to him (Bonacorsa) (Tr. 138; 142; 244-245).2/

The Defense Witnesses - Martin and Matthew Lentsch

Martin Lentsch, a resident of Indiana, was called to testify concerning an arrangement between himself and Joseph Bonacorsa whereby Lentsch's son, Matthew, was to work as an apprentice to Bonacorsa in New York, in return for which Lentsch would advance Bonacorsa the money needed to buy horses and establish a stable (Tr. 292-297). The trial court struck all of Lentsch's testimony and instructed the jury to disregard it (Tr. 326; 339). Defense counsel argued, to no avail, that this testimony was relevant to establish the source of the money used by Bonacorsa to purchase Joli Timmy and other horses during February and March of 1973, to rebut the government's contention that Forrest Gerry was the source (Tr. 341-342).

Martin Lentsch's son, Matthew, when first called as a witness, testified that in December of 1972 he came to New York with $30,000 which his father had given him in accordance with the above agreement with Joseph Bonacorsa. With this money, plus an additional sum of $20,000 which Matthew later received from his father, Bonacorsa purchased five horses--Joly Timmy, Armbor Invader, Jet Butler, Local Lie, and Timber (Tr. 328-335). When Matthew Lentsch testified that he had not personally given this money to the seller of Joli Timmy, but rather had given it

---

2/ The testimony is set forth under Point III, infra, pp. 21-24.

to Joseph Bonacorsa, the court struck all his testimony and instructed the jury to disregard it (Tr. 338-339).

The defense was then permitted to make an offer of proof outside the presence of the jury (Tr. 345-354). Essentially, Martin Lentsch testified concerning the circumstances surrounding the purchase of Joli Timmy (Tr. 345-347); the details concerning how he and Bonacorsa trained the horse (Tr. 348); the races the horse entered and how it placed (Tr. 348, 350-352); that he saw the bill of sale for the horse a few days after it was delivered to Bonacorsa's stable (Tr. 349); that he saw Mary Bonacorsa pay sales tax on Joli Timmy (Tr. 350); that Joli Timmy was eventually sold for $5,000 (Tr. 352), the disposition of the other four horses purchased with his father's money (Tr. 352-353); that he never saw Forrest Gerry in connection with Joly Timmy (Tr. 354); and that he doesn't know Mr. Schweitzer or Mr. Rubin (Tr. 352).

At the conclusion of this offer of proof the trial court stated the evidence was not competent, essentially because it did not prove that Forrest Gerry didn't buy Joli Terry (Tr. 355-56). However, eventually the court permitted Matthew Lentsch to testify again, but with the following limiting instruction:

> So I'm going to allow him to testify to certain events, certain facts that he did, not the conversations he had, but certain events which he had personal knowledge of, but you are not to take into account his prior testimony as far as participation.
>
> You will hear the extent of what he did and then you will consider that in determining this defendant's financial ability to do what he said he did in this particular case, and that is essentially what, at least a portion of this evidence is being offered for, and

the rest of the evidence he'll be permitted to testify to. (Tr. 376)

POINT I

THE EVIDENCE DID NOT ESTABLISH THAT JOSEPH BONACORSA WAS NOT THE ACTUAL OWNER OF THE HORSE JOLI TIMMY. ACCORDINGLY, COUNTS II AND III OF THE INDICTMENT, AS WELL AS THOSE SPECIFICATIONS OF PERJURY IN COUNT I BASED UPON "HIDDEN OWNERSHIP" SHOULD HAVE BEEN DISMISSED AT THE CLOSE OF THE EVIDENCE UPON THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL.

The basis of the Government's case against Joseph Bonacorsa is alleged "hidden ownership" of a race horse. The Government contended that in February of 1973, when the horse Joli Timmy was purchased and later registered in Bonacorsa's name, the actual, but hidden, owner was Forrest Gerry, Jr. The charges of perjury and obstruction of justice are essentially based upon Bonacorsa's efforts at concealing this alleged ownership by Gerry from the grand jury.

In effect, this case presents the converse of the situation in United States v. Turcotte, 515 F.2d 145 (2d Cir. 1975), where Forrest Gerry, Jr. was charged with being the actual owner of a horse registered in someone else's name. Here Joseph Bonacorsa is charged with not being the owner of a horse that was registered in his name.

A brief comparison of the facts in the Turcotte case with those here demonstrates the insufficiency of the evidence upon which Joseph Bonacorsa was convicted. First, and perhaps most important, in Turcotte the registered owner (David Kraft)

testified as the government's principal witness, and said he was not the actual owner of the horses in question. In the present case, the government failed to produce a single witness competent to testify as to ownership of the horse Joli Timmy after it was sold in February, 1973 (the period of the alleged hidden ownership).

In Turcotte, the government produced tape recordings of conversations in which the defendants agreed to testify falsely concerning Gerry's activities.[8/] Here, the alleged obstruction of justice consists of the uncorroborated testimony of a single witness, who, in any event, testified only that Bonacorsa told him that he (Bonacorsa) had bought Joli Timmy and that it was his horse.

Moreover, in Turcotte the Court noted that "Kraft (the registered owner) knew virtually nothing about the horses." In the present case, uncontroverted testimony established that Bonacorsa raced, trained and cared for the horse in question on a daily basis after he purchased it.[9/] Conversely, the government produced no evidence that Forrest Gerry, allegedly the actual owner, had anything whatsoever to do with the horse after it was sold to Bonacorsa.

Under well established standards, the government failed to sustain its burden of proof concerning alleged "hidden ownership."

8/ Ironically, these same tape recordings indicate that Forrest Gerry was not the actual owner of any of Bonacorsa's horses. (A-261-262)

9/ Unfortunately, the trial court ruled that this evidence was inadmissible. (Tr. 338-339, 355-356, 376)

United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). Accordingly, Counts II and III of the indictment, as well as those specifications of perjury in Count I based upon hidden ownership, should never have gone to the jury.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT JOSEPH BONACORSA KNOWINGLY GAVE FALSE TESTIMONY BEFORE THE GRAND JURY BECAUSE HIS RESPONSES WERE TRUTHFUL UNDER HIS REASONABLE INTERPRETATION OF THE AMBIGUOUS QUESTIONS ASKED OF HIM.

The government did not establish that Joseph Bonacorsa knowingly gave false testimony before the grand jury.

The crucial element of perjury is the belief of the defendant in the verity of his sworn testimony. United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965). It must be shown that the defendant gave a response which he knew to be false.

Two situations have been recognized as being insufficient as a matter of law to support a perjury conviction. In United States v. Bronston, 409 U.S. 352 (1973), the Supreme Court held that a witness may not be convicted for an answer which is literally true but unresponsive to the question asked, even if intended to mislead the questioner.

The second situation is where the question asked is sufficiently ambiguous to be subject to more than one reasonable interpretation. In such a case, if the response given is true under any reasonable interpretation, the witness cannot be

convicted of perjury unless the evidence establishes beyond a reasonable doubt that the witness actually understood and interpreted the question in the same manner as the questioner. United States v. Wall, 371 F.2d 398 (6th Cir. 1967).

The single perjury count in this case contains 26 different questions and answers excerpted from Joseph Bonacorsa's September 14 and December 19, 1973 grand jury appearances, and a deposition which he adopted during the latter grand jury session. Although these questions are not broken down into enumerated specifications, the prosecutor repeatedly referred to "nine lies" in his summation. (A-193, 197, 205, 212) Several, if not all, of the questions comprising these "nine lies" are ambiguous and subject to at least one plausible interpretation under which the answers given were true.

The following questions and answers appear in Count I of the indictment and constitute, according to the prosecutor, the first five of the "nine lies":

(1) Q. What about the fifth horse?

A. I didn't want to hold any money. The fifth horse I bought outright and I believe I remember the name of the people was Ruben. Steve Ruben.

(2) Q. And anybody else?

A. I think he had a partner but I dealt with Steve because he was a trainer and so on and so forth and I got a bill of sale from him for the amount that I purchased the horse for and also we paid the City sales tax to the tax people for the amount of the horse.

(3) Q. You dealt with him directly?

A. Yes.

(4) Q. How did you pay him, with a check or cash?

A. No cash.

(5) Q. Do you remember approximately when this was?

A. It was in February sometime, Hal. I don't know the exact date right offhand.

(6) Q. How many times did you deal with him, just that one time?

A. With who is this?

(7) Q. Mr. Ruben.

A. Just the one time, Yes.

(8) Q. And this is for the horse Joli Timmy? Is that correct?

A. Right.

The prosecutor argued that the response to question 2 ("And anybody else?") was false in that Mr. Bonacorsa stated "but I dealt with Steve." (A-188-89)

At the time of the sale, Joli Timmy was owned by Leonard and Richard Schweitzer, and Steve Rubin was their trainer and partner. The evidence established that it was Steve Rubin who delivered the horse and registration papers to Bonacorsa, and Rubin who later gave Bonacorsa a bill of sale. The evidence also established that Bonacorsa never met or had anything to do with either Leonard or Richard Schweitzer. Thus, the response "I dealt with Steve", both reasonably and truthfully referred to the fact that Bonacorsa received the horse, registration papers and bill of sale from Steve Rubin, and not from the partner, Schweitzer.

In the next question, "You dealt with him directly?", the prosecutor apparently had in mind the negotiations which

took place between Gerry and Rubin, and the fact that Gerry had paid Schweitzer and Rubin the $3,500 in cash for the horse, not Bonacorsa. Therefore, he argues the response to this question was false (A-191). However, it was Mr. Bonacorsa who first used the word "dealt" in his preceding response, and as indicated above, he was referring to the fact that the transfer of the horse, registration papers and bill of sale was between himself and Rubin, to the exclusion of the "partner" (Schweitzer). Under this interpretation, the response was a truthful reiteration of what he had just said, which is certainly plausible, especially in view of the leading nature of the question asked.

The next question ("How did you pay him, with a check or cash?") indeed put Mr. Bonocorsa on the horns of a dilemma. The prosecutor argued that the response "cash" was false because Forrest Gerry paid the cash, not Bonacorsa (A-191). Had Bonacorsa said check, clearly this also would have been perjurious under the prosecutor's theory. Certainly this form of question cannot be the basis of a perjury conviction. See United States v. Cook, 497 F.2d 753, 768 (9th Cir. 1972).

The response to question 6 ("How many times did you deal with him [Rubin], just that one time?") was the "fifth lie" according to the prosecutor (A-191), because payment for Joli Timmy was made in two installments (A-176). We submit that here we are no longer even within the reasoning of United States v. Wall, supra, because the prosecutor's interpretation of this question is not even reasonable. It is simply preposterous to suggest that that question directed Mr. Bonacorsa's attention to the

manner in which payment for Joli Timmy was made.

This brings us to another, fundamental defect in the questioning of Joseph Bonacorsa. Although the precise holding of United States v. Bronston, 409 U.S. 352 (1973) is inapposite because we are dealing with truthful answers to ambiguous questions rather than truthful but unresponsive answers, a basic teaching of that decision is most relevant.

In Bronston, the Court noted that "a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony. . . ," and that the "burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. . . ." 409 U.S. at 360. "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362.

At the time the prosecutor questioned Mr. Bonacorsa, he knew that Forrest Gerry, Jr. had negotiated a sale of the horse Joli Timmy, and had in fact paid the sellers (Rubin and Schweitzer) a total of $3,500 in cash on two separate occasions. Yet, he also knew that the horse was delivered to Bonacorsa and registered and raced in Bonacorsa's name. Certainly there was a legitimate basis for suspicion and further inquiry.

However, at no time during the three grand jury appearances or the deposition, was Mr. Bonacorsa asked a single question which focused directly on these facts. He was never asked, for example,

> How did you learn Joli Timmy was for sale?
>
> Did you personally deliver the money to Steve Rubin?

Did Forrest Gerry, Jr. have anything to do with the purchase of Joli Timmy?

In fact, at no time during Mr. Bonacorsa's four different appearances was he ever asked a single question which mentioned both Forrest Gerry and the horse Joli Timmy. The inescapable conclusion is that the prosecutor was either woefully inept at examining a witness, or intentionally baiting Joseph Bonacorsa for a perjury indictment. In either event, his questions cannot properly be the basis of the conviction in this case.

Because at least one of the specifications of perjury should have dismissed as a matter of law and the jury returned a general verdict as to Count I, the perjury conviction must be versed.[10] Yates v. United States, 354 U.S. 298, 312 (1957); United States v. Adcock, 447 F.2d 1337 (2d Cir. 1971), cert. denied 404 U.S. 939 (1971); Vitello v. United States, 425 F.2d 416, 419 (9th Cir. 1970).[11]

---

[10] It is therefore unnecessary to examine all of the questions in the indictment. We note, however, that the remainder of the "nine lies", based upon the word "deal" or the word "agent", are likewise far too imprecise to sustain a perjury conviction absent sustantial proof of a meeting of minds as to their meaning.

[11] It should further be noted that the jury was not instructed that all twelve jurors must unanimously agree on at least one of the statements charged in the indictment. Vitello v. United States, supra, at 419.

POINT III

THE GUILTY VERDICT AS TO COUNT III SHOULD BE REVERSED BECAUSE OF INSUFFICIENCY OF THE EVIDENCE AND VARIANCE BETWEEN PLEADING AND PROOF.

Counts II and III of the indictment charge obstruction of justice in violation of 18 U.S.C. § 1503. They are identical, except for the dates of the alleged obstruction, and read as follows:

COUNT II

> On or about the last week in February, 1973 in the Eastern District of New York, Joseph Bonacorsa did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Eastern District of New York, by corruptly endeavoring to influence, obstruct, and impede Steve Rubin, a witness, who knew material facts and was expected to testify to them and be called as a witness and was so called as a witness before the Special May 1972 Grand Jury inquiring in said District into possible violations of the sports bribery law, 18 United States Code, Section 224, to give material false testimony before said body in relation to the aforesaid violation.
>
> (Title 18, United States Code, Section 1503)

COUNT III

> On or about the month of September, 1973 within the Eastern District of New York, . . . [same as above].

In response to a defense demand for a bill of particulars as to these counts, the government stated:

> Bonacorsa told Steve Rubin to say that the horses were Bonacorsa's not Forrest Gerry's. (A-269)

As to specific dates, the government repeated the dates set forth in the indictment, and added, as to Count III, "shortly after or about time Forrest Gerry was arrested at Roosevelt Raceway." (A-269)

At trial, the government's proof of the alleged obstruction of justice consisted of the testimony of Steve Rubin. He testified as to a conversation which allegedly took place at the time he gave Joseph Bonacorsa a bill of sale for the horse Joli Timmy:

> Well, we both drove to in front of the racing secretary's office and at that time he gave me a blank piece of paper and I wrote out a bill of sale to his wife and I was told by him that if anybody asked, the horse belonged to him; he bought the horse. (Tr. 138)
>
> * * *
>
> Q Now, this conversation is, anything said with reference to protecting yourself?
>
> MR. CASTELLANO: I object to the leading questions now.
>
> THE COURT: Can you remember anything further about the conversation?
>
> THE WITNESS: Well, in essence, I gave him the bill of sale which I wrote out and I was told if anybody questioned, you know, on the horse it would be better that -- it would be better for the both of us that--if I said he bought the horse.
>
> THE COURT: He meaning who?
>
> THE WITNESS: The horse was his, his wife's. If anybody investigated.

THE COURT: That's all you can remember?

THE WITNESS: Yes.

After several leading questions by the prosecutor, Rubin stated that this occurred in September of 1973 (A-136-137).

As to the second obstruction of justice, Rubin testified that one or two weeks after he gave Bonacorsa the bill of sale, he "accidentally" met him on the training track at Roosevelt Raceway, and the following was allegedly said:

THE COURT: Go ahead.

What did he say to you?

THE WITNESS: I made reference -- had he heard anything about Forrest Gerry and he said he hadn't and he reiterated, we just chatted how the horse is, the routine stuff that you chat at racetracks, how your horse is or what's doing and he made reference and said if anyone -- if somebody were to question me on the horse just stay with the -- you know --

Q Story?

A -- story.

THE COURT: Which was what?

THE WITNESS: That he had bought the horse, that it was his horse.

During cross examination, Rubin was asked the following questions:

Q How many times was it that you had an actual conversation, you and that defendant, Joseph Bonacorso?

A Not too often, maybe twice.

Q Well, we know about once in the car when you gave him a bill of sale.

A Yes, sir, and maybe on the race track.

Q Another time on the race track?

A Right.

Q Now, you say that in these two conversations Mr. Bonacorso said to you to remember that Joli Timmy was his horse or Mary Bonacorso's horse in that it was in her name; is that right?

A Yes, sir.

Q Did Joseph Bonacorso ever say to you in either one of those two conversations, Rubin, you know that that horse is Gary's [sic] and actually I am being put in as owner for hidden ownership?

A No, sir.

Q No way did he ever say that?

A No.

Q There was never any words expressed by him along those lines?

A That is right.

Q That he said. Remember, that horse is my wife's horse, and it is in my wife's name; is that right?

A Yes, sir. (Tr. 233-235)

During redirect, the prosecutor went over the alleged incidents of obstruction of justice again with Rubin:

Q Tell us again what he told you at that time, both times.

A He said, if there were any investigation, I sold the horse to him.

And the second time he said -- He asked if there was any investigation, and I said, "No, nobody has asked me."

And he said, "Well, stay with it. You know, the horse is his."

Q And, at any time, did he use the words, "Keep to the story"? The phrase or --

MR. CASTELLANO: I object to the form of that question.

THE COURT: Overruled.

MR. CASTELLANO: Exception, please.

A No, he didn't, he didn't use that terminology, I don't remember him using that terminology. He made a statement, but I can't remember it. (Tr. 244-245)

Even when viewed in the light most favorable to the government, this evidence, considered together with the absence of proof that Bonacorsa did not in fact own Joli Timmy, was insufficient to sustain a conviction under 18 U.S.C. § 1503.[12/]

In addition to insufficiency of the evidence, the guilty verdict under Count III must be set aside because of material variance between the offense charged by the grand jury and the proof at trial.

Steve Rubin testified twice before the grand jury.

12/ We note, in addition, that although the trial court instructed the jury that they must find "that the defendant acted corruptly" in order to convict (Tr. 546), this was followed by further instructions concerning "knowingly" and "wilfully". (Tr. 547-548) The jury received no explanation concerning the meaning of "corruptly" under 18 U.S.C. § 1503.

During his first appearance, on October 3, 1975, he pleaded the Fifth Amendment and refused to answer any questions (A-215). During his second appearance, on October 15, 1975, Rubin testified concerning sale of the horse Joli Timmy:

> A He [Gerry] gave me cash. He gave my partner $1,000 in cash and he gave me the balance in the Yonkers parking lot which amounted to $2,500. Total purchase of the horse was $3,500 and a few days later, I gave the eligibility paper that enables you to race a horse and passed it on to Gerry. Gerry then gave the papers to Joe Bonacorsa and I'd say a couple of weeks passed and all of a sudden there was an investigation that was announced and I got a phone call from Forrest Gerry's girl friend, Connie Rogers, that I should see Joe Bonacorsa the following day.
>
> I met Joe Bonacorsa--
>
> Q Did Miss Rogers also state that Joe will pick up the stuff tomorrow, meaning the papers for the horse?
>
> A Yes. I was to make him out a bill of sale.
>
> Q And in other words you were to make all documents out to Joe Bonacorsa instead of Forrest Gerry?
>
> A The transaction was with Forrest Gerry but the bill was to be given to Joe Bonacorsa.
>
> Q And then did you also receive a phone call from Joe Bonacorsa?
>
> A No. I saw Joe Bonacorsa the next day. He came over to my stable in the barn area at Roosevelt Raceway and he drove me off and we transferred the papers. In other words, the bill of sale to him in his Cadillac car in front of the racing secretary's office at Roosevelt Raceway.
>
> Q And did he say anything at that time that

this is my horse or you were--

A He said if anybody asks you which horse for the benefit of both of us, it's my horse.

Q Did you also receive a phone call from Joe Bonacorsa at a later time approximately when Forrest Gerry was arrested?

A No. Joe Bonacorsa--

Q Didn't you receive a phone call from Joe Bonacorsa at that time that Forrest Gerry was arrested telling you that it's my horse and not Forrest's in case anything--

A Well, I had spoken to Joe but not a phone call. It was never a phone call.

Q This was a later meeting?

A I seen him on the race track, you know, and just, you know, dropping words. If you are called down or investigated, it's my horse. You say you sold the horse to me. (A-225-26) (emphasis added).

This testimony was the basis of the two obstruction of justice counts of the indictment. The first incident (Count II) allegedly occurred at the time the bill of sale was given to Bonacorsa and the second incident (Count III) allegedly occurred on the track at Roosevelt Raceway.

As to the dates of the two incidents, Rubin told the grand jury that the bill of sale was given to Bonacorsa "a couple of weeks" after sale of the horse (February, 1973).[13/]

13/ This corresponds to Rubin's October 15, 1973 statement to the FBI to the effect that he gave Bonacorsa the bill of sale "very shortly after" the sale of Joli Timmy. (A-219)

Thus, Count II reads "On or about the last week in February, 1973 . . . ." He testified that the second incident allegedly occurred at about the time Forrest Gerry was arrested (September, 1973). Thus Count III reads "On or about the month of September, 1973 . . . ."

As set forth above, at the trial Rubin testified as to the same two incidents, but with one very material change. The bill of sale incident, instead of taking place in February, 1973, is now placed some seven months later, in September, 1973. (Although the trial court denied the defense motion for judgment of acquittal as to all counts (Tr. 398-401), the jury correctly returned a non-guilty verdict as to Count II; there was absolutely no evidence concerning obstruction of justice in February, 1973.)

By virtue of the lack of specificity in the indictment, the government was permitted to prove under Count III the obstruction of justice for which the grand jury returned Count II.

It is neither possible nor necessary to determine whether the grand jury would have indicted Mr. Bonacorsa for the "bill of sale" obstruction of justice had Rubin originally fixed the date as September rather than February. The fact is that he did not. Mr. Bonacorsa was therefore convicted of an offense for which the grand jury did not return an indictment.

Stirone v. United States, 361 U.S. 212, 217 (1960); Russel v. United States, 369 U.S. 749, 770-771 (1962).

The prejudice resulting from this variance is readily apparent. There was absolutely no evidence that Mr. Bonacorsa was aware of the grand jury investigation prior to his being subpoenaed as a witness in June, 1973. Therefore, had Rubin testified at trial that the alleged obstruction of justice occurred in February, 1973, an essential element of the offense -- knowledge that Rubin was to be called as a grand jury witness -- would have been lacking. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). By the change in date from February to September, when the harness racing investigation was well publicized, Forrest Gerry had been arrested, and Bonacorsa had himself been twice called as a grand jury witness, this element of the offense was no longer an insurmountable barrier. In addition, it was far easier for the government to ascribe a motive for the alleged obstruction of justice. Moreover, the fact that both incidents now allegedly occurred in September, just a few weeks rather than seven months apart, in itself supported an inference that Mr. Bonacorsa actually had something to conceal.

Clearly, appellant's "substantial rights" were affected by this variance, and the conviction must be set aside. Berger v. United States, 295 U.S. 78 (1935); Stirone v. United

States, 361 U.S. 212 (1960); United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971).

POINT IV

EXCLUSION OF THE TESTIMONY OF MARTIN LENTSCH, THE LIMITING INSTRUCTION CONCERNING THE TESTIMONY OF MATTHEW LENTSCH, AND THE PARTICIPATION OF THE TRIAL JUDGE IN THE EXAMINATION OF BOTH DEFENSE WITNESSES, DENIED JOSEPH BONACORSA A FAIR TRIAL.

Martin Lentsch testified that he was the source of the money used to purchase Joli Timmy and several other horses in February and March of 1973. This testimony, at the very least, was relevant to establish a foundation for the testimony of Matthew Lentsch. It was competent evidence and error to exclude it.

Matthew Lentsch, the second defense witness, was the only individual called to testify at the trial who had direct contact with Joli Timmy after the transfer of ownership in February, 1973. The trial court initially excluded his testimony because he didn't participate in the actual exchange of money when Joli Timmy was purchased (Tr. 340). This restricted view of the factual issues in the case, which equates Gerry's prior negotiations and payment of money with ownership, effectively precluded Joseph Bonacorsa from presenting any

defense at all.[14/]

Eventually the court did permit Matthew Lentsch to testify, but with the following limiting instruction:

> So I'm going to allow him to testify to certain events, certain facts that he did, not the conversations he had, but certain events which he had personal knowledge of, but you are not to take into account his prior testimony as far as participation.
>
> You will hear the extent of what he did and then you will consider that in determining this defendant's financial ability to do what he said he did in this particular case, and that is essentially what, at least a portion of this evidence is being offered for, and the rest of the evidence he'll be permitted to testify to. (Tr. 376)

Under this instruction, the jurors were not permitted to consider Matthew Lentsch's testimony that it was Joseph Bonacorsa and his sons who exercised dominion and control over Joli Timmy on a daily basis (Tr. 382), that the horse was raced and trained by Bonacorsa (Tr. 378-383), and that Forrest Gerry had absolutely nothing to do with the horse (Tr. 386). In addition, the jury could not consider Lentsch's testimony

---

14/ The prejudice resulting from this error was amplified by the court's failure to give the jury any instructions or guidance as to the meaning of "ownership," a term which "'varies in its significance according to the context and the subject matter with which it is used. . . .'" Blumenfield v. United States, 306 F.2d 892, 899 (2d Cir. 1962). By the trial judges' actions, the jurors were left with the impression that unless Bonacorsa personally delivered the money for the horse, he could not have owned it. Since the defense did not contest that Gerry made these payments, the jury was left with little choice as to its verdict.

that he saw the bill of sale about a week after the horse was delivered (Tr. 383), which contradicted Steve Rubin, and was most relevant with regard to the obstruction of justice charge.

Finally, we believe that a fair reading of the transcript supports defense counsel's contention (Tr. 396-398) that the judge's participation in the examination of the Lentschs was excessive and prejudicial to the defendant. United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

POINT V

JOSEPH BONACORSA WAS DENIED A FAIR TRIAL BECAUSE OF EXCLUSION OF THE OWNERSHIP REGISTRATION OF JOLI TIMMY, THE JURY'S KNOWLEDGE OF THE ORIGINAL INDICTMENT, AND THE COURT'S FAILURE TO ANSWER THE JURY'S QUESTION CONCERNING THE PERJURY COUNT OF THE INDICTMENT.

Three incidents occurred during the jury's deliberations which, when taken together, especially in light of the weakness of the government's proof, warrant a new trial.

Exclusion of Ownership Registration of Joli Timmy

During deliberations, the jury sent a note requesting a copy of the indictment, the bill of sale, and the "registration of Jolly Timmy." (A-247) A controversy then arose as to what portions of the United States Trotting Association

file on Joli Timmy had actually been placed in evidence (Tr. 563-577). Eventually, over defense objection, the court ruled that the actual ownership registration certificate (A-249) had not been placed in evidence. The jury therefore received no documentation of the transfer of ownership of Joli Timmy from Mary Bonacorsa to Matthew Lentsch in September, 1973, about which they heard testimony.

In excluding this item of evidence, the trial court ruled both that it had never been placed in evidence, and that even if it had, it was being stricken (Tr. 567).

Perhaps the best indication that the registration was relevant evidence is that the jury asked for it so early in their deliberations (Tr. 563). The reason for its exclusion--that it represented a self-serving act in that the transfer occurred after Joseph Bonacorsa's first two grand jury appearances--flies in the face of the presumption of innocence. In addition, the inconsistency of the court's ruling, in permitting testimony about the sale, but not the documentation, could only confuse the jury. Moreover, we believe the record unquestionably justifies defense counsel's belief throughout the trial that the complete registration was in evidence. (See Tr. 37, 42-43, 363, 366-367.)

Jury's Receipt of Wrong Indictment

During its deliberations, the jury requested a copy of the indictment. Through inadvertence, the jury was given a copy of the original indictment filed December 19, 1973 (73 CR 1069), rather than the superseding indictment filed February 25, 1974 (74 CR 134).

After about four hours the error became apparent and the jury was given the correct indictment. A defense motion for a mistrial, supported by affidavit (A-243), was denied. The trial court believed this error had not prejudiced the defendant.

When this occurrence is considered with due regard to the nature of the charges and circumstances of this case, the possibility of substantial prejudice is readily apparent.

Count I of the original indictment was based only upon Joseph Bonacorsa's testimony before the grand jury on September 14, 1973. The specifications of alleged perjury consisted of only four questions and answers.

Count I of the superseding indictment consisted of the above testimony plus twenty-two additional questions and answers from the December 19, 1973 grand jury appearance and the December 17, 1973 deposition.

There was certainly the possibility that at least some, if not all, of the jurors made the reasonable, although

erroneous, assumption that the original indictment had been returned sometime between the September and December grand jury appearances. They would therefore view Mr. Bonacorsa's responses during the December questioning as those of an individual who had already been indicted for perjury.

Such a misunderstanding of the sequence of events would indeed be prejudicial. The jury would quite naturally and justifiably view the December testimony in a more critical light if they thought Mr. Bonacorsa was aware at the time that he had already been indicted for perjury concerning Forrest Gerry's hidden ownership of the horse Joli Timmy.

A defendant has the right to be tried only on the basis of facts placed in evidence at trial. The jury's knowledge of the two indictments was an unnecessary and prejudicial infringement of that right.

Failure to Answer Jury's Question

During its deliberations, the jury asked the following question in a note:

> The jury would like to know whether "count one" starts with the questions on whether the defendant had any business relationships with Forrest Gerry or whether it strictly deals with the questions and answers in count one. (A-248)

At the time the note was received the court had just discovered that the jury had been given the wrong indictment.

It was assumed that this was the cause of the question and the correct indictment was substituted. However, the trial court never actually responded to the jury's query (Tr. 587-588).

The responsibility of a trial court regarding inquiries by a jury during its deliberations was stated thusly in Bollenbach v. United States, 326 U.S. 607, 612-613 (1946):

> Where a jury makes explicit its difficulties a trial judge should clear them away from concrete accuracy.

See also, United States v. Pfingst, 477 F.2d 177, 197 (2d Cir. 1973).

The jury apparently did not understand the significance of that part of the indictment which listed the subjects of inquiry which were material to the grand jury (referred to as "questions" in the note). They were, in effect, asking whether or not the truth or falsity of these "questions" was an issue which they were to resolve.

The jury should have been instructed that they could disregard these "questions" completely, as they dealt solely with the materiality of defendant's testimony, and the court had already determined that all questions in the indictment were material (Tr. 542).

In the absence of a clear explanation, the jury's confusion may have resulted in a guilty verdict based merely upon a finding that one or more of these "questions" were

untrue. In effect, the jury would have disregarded the critical issue of whether Joseph Bonacorsa knowingly made false statements.

POINT VI

THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED BECAUSE THE PROSECUTION WAS BASED UPON THE TESTIMONY OF JOSEPH BONACORSA AFTER THE DECISION TO INDICT HIM HAD BEEN MADE.

A. It was an unlawful abusive use of the grand jury to recall Joseph Bonacorsa as a witness without fully advising him of his constitutional rights and the fact that the government had decided to seek an indictment against him for perjury and obstruction of justice.

This court recently wrote in United States v. Del Toro, 513 F.2d 656, 664 (2d Cir. 1975):

> We do not condone the use of the Grand Jury for the sole purpose of preparing an already pending indictment for trial, see United States v. Dardi, 330 F.2d 316, 336 (2 Cir. 1964), and there may be situations in which no indictment has yet been filed where this stricture would apply.

This is such a situation.

Joseph Bonacorsa was originally subpoenaed before the special grand jury investigating harness racing on June 11, 1973. He testified on that date, and again on September 14, 1973. At the government's request, he appeared to testify

before the grand jury again on December 17, 1973. However, a quorum of jurors was not present, and he submitted to a deposition at the Brooklyn Strike Force Office instead. On December 19, 1973, he appeared again at the government's request, and adopted the deposition before the grand jury. Later that day, an indictment was returned charging him with one count of perjury and two counts of obstruction of justice (73 Cr. 1069) (A-6). On February 25, 1974 the superseding indictment (74 Cr. 134) was filed. It was essentially identical to the original indictment, except 22 additional questions and answers from the December deposition and grand jury testimony were added to the perjury count (A-9).

At a post-trial evidentiary hearing held on the issue of whether Joseph Bonacorsa's constitutional rights were violated during the grand jury proceedings,[15] the government stipulated that the decision to indict Mr. Bonacorsa for perjury and obstruction of justice (i.e., to seek the initial indictment, 73 CR 1069), was made on December 13, 1973 (H. Tr. 10)[16] This was during the week prior to Mr. Bonacorsa's

---

15/ See memorandum and order of May 6, 1975 (A-270).

16/ The government stipulated that on December 13, 1973 "Mr. Meyerson had decided to indict Mr. Bonacorsa for perjury and obstruction of justice and Mr. Dillon had approved that decision, and that was also forwarded to Washington for their approval." (H. Tr. 10) It was not clear as to precisely what date the approval from Washington was received (H. Tr. 13). ("H. Tr." refers to transcript of the June 6, 1975 evidentiary hearing.)

testimony at the deposition (December 17th) and before the grand jury (December 19th).

It was further stipulated that Mr. Bonacorsa was never informed of the government's decision to seek an indictment against him (H. Tr. 13), and that the only constitutional warnings he received prior to the December 17, 1973 deposition and December 19, 1973 grand jury appearance are those reflected in the transcripts of these proceedings (H. Tr. 12).

In affidavits submitted in the court below, both Mr. Bonacorsa and his attorney stated that at the time of the December deposition and grand jury appearance not only were they unaware that the decision to seek an indictment had been made, but in fact, they had been led to believe that Mr. Bonacorsa was <u>not</u> going to be indicted (A-259-60, 281).

At the post-trial evidentiary hearing, the Special U.S. Attorney assigned to this case during the grand jury proceedings and at trial (who is no longer with the U.S. Department of Justice) testified as to the reason he recalled Mr. Bonacorsa:

> * * * Before the 17th I realized that there might be a possible opening whereby Mr. Bonacorsa did not commit perjury at all and only by questioning him as to relating to those facts would we in fact find out whether that would be the case. Specifically, I remember Mr. Bonacorsa said that Forrest Gerry was his agent in going to Steve Rubin to buy the horses; then in fact I didn't think it would be very possible that there would not be conclusive evidence to show that Mr. Bonacorsa owned it. * * * (H. Tr. 22)

It is difficult to imagine a clearer case of misuse of the grand jury. Mr. Bonacorsa was recalled because the prosecutor thought there might be "a possible opening whereby Mr. Bonacorsa did not commit perjury at all." In effect, he was recalled to close some holes which the prosecutor saw in his case, a case in which the decision to indict had already been made.[17/]

We are not suggesting that under no circumstances could Mr. Bonacorsa be recalled before the grand jury after the government felt it had enough evidence to secure an indictment against him. See United States v. Sweig, 441 F.2d 114, 121 (2d Cir. 1971). We do suggest, however, that in so doing, the government treads dangerously close to the outer limit of the Fifth and Sixth guarantees. Accordingly, it must observe the highest standards of fairness.

Here the record indicates that both Mr. Bonacorsa and his attorney were misled into believing Mr. Bonacorsa would not be indicted. Furthermore, neither at the deposition, nor at the December 19th grand jury session, was Mr. Bonacorsa fully advised of his Fifth Amendment rights--certainly a minimal

---

17/ It is perhaps worth noting that at the trial the prosecutor gave the trial court the erroneous impression that he did not become aware of this possible agency defense until "weeks" or "months" after the original indictment was filed. (H. Tr. 28) See Tr. 617-619.

requirement under these circumstances.

In addition, as has previously been discussed with regard to the deficiency of the perjury count (Point II, pp. 18-19, supra), the prosecutor never asked Mr. Bonacorsa a single specific question which directly focused on the nature and extent of Forrest Gerry's participation in the purchase of Joli Timmy. We submit that when one considers the specific information that the prosecutor had at the time of the questioning -- that Forrest Gerry had delivered cash to both Richard Schweitzer and Steve Rubin, and had previously negotiated with them on behalf of a New Zealand interest -- and the ambiguous, nonspecific form of the questions asked, the inescapable conclusion is that the prosecutor was far more interested in obtaining additional specifications of perjury than seeking the truth.

Accordingly, either as a matter of constitutional law, or on the basis of the Court's supervisory power of grand jury proceedings,[18/] the conviction should be reversed and the indictment dismissed. See United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964); United States v. Del Toro, supra, 513 F.2d 656, 664 (2d Cir. 1975).

18/ See McNabb v. United States, 318 U.S. 332, 340 (1943); United States v. Calandra, 414 U.S. 338, 346 n.4 (1974).

B. All evidence obtained from Joseph Bonacorsa at the December 19, 1973 grand jury session must be suppressed because he was a putative defendant and had not been fully advised of his Miranda rights prior to being interrogated.

In United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), cert. granted, ___ U.S. ___, 95 S.Ct. 1422, 43 L.Ed.2d 669 (1974),[19/] the Court held that a "virtual" or "putative" defendant was entitled to full Miranda warnings prior to testifying before a grand jury. Also see United States v. Stanley, 245 F.2d 427 (6th Cir. 1957); United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio 1968); United States v. Kreps, 349 F.Supp. 1049 (W.D. Wisc. 1972); United States v. Chevoor, 392 F.Supp. 436 (D. Mass. 1975). The rule in this Circuit appears to be contra. United States v. Scully, 225 F.2d 113 (2d Cir. 1955); United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

There can be no doubt that on December 19, 1975, at the time of his final grand jury appearance, Joseph Bonacorsa was a "virtual" or "putative" defendant as the term is used in the above cases. In addition, the government has stipulated that full Miranda warnings were not given at that time. Therefore, under Mandujano, supra, all evidence obtained at the

---

19/ Briefs have been filed (No. 74-754) but argument has not yet been heard.

December 19, 1973 grand jury session would be suppressed.

POINT VII

THE PROSECUTOR'S REPEATED ACTS OF MISCONDUCT DEPRIVED JOSEPH BONACORSA OF A FAIR AND IMPARTIAL TRIAL.

In addition to the misconduct concerning the grand jury proceedings, and a blatant violation of the government's Brady obligation in response to a defense discovery motion,[20] there were numerous instances of misconduct by the prosecutor at trial. Salient examples are the prosecutor's misleading statement concerning the charges during his opening, repeated use of leading questions during the examination of Steve Rubin, the chief prosecution witness, and a most inaccurate and prejudicial summation.

Opening Statement

During his opening, the prosecutor stated the following concerning the alleged perjury of Joseph Bonacorsa:

> Now, what that lie was -- you heard the judge read a very long two or three pages of testimony. I'll boil it down to you in one sentence and give you a very short opening.

---

[20] The prosecutor failed to disclose a government tape recording of a conversation in which Forrest Gerry unequivocally states that he was not the hidden owner of any of Joseph Bonacorsa's horses. See A-261-268.

> The Government claims Mr. Bonacorso lied by attempting to deny that Forrest Gerry, Jr. had anything whatsoever to do with the horse Jolly Timmie. Mr. Bonacorso claimed he owned the horse Jolly Timmie, that he negotiated and paid for the horse and Forrest Gerry had no connection with it whatsoever. (Tr. 3-4)

This "summary" of the perjury count of the indictment was inaccurate, false and misleading. At no time did Joseph Bonacorsa ever "deny that Forrest Gerry, Jr. had anything whatsoever to do with the horse Joli Timmy." This is precisely the type of question which Joseph Bonacorsa was not asked when he testified before the grand jury. Furthermore, although Mr. Bonacorsa certainly did claim he owned the horse Joli Timmy, he never stated that he "negotiated" for the horse, or that "Forrest Gerry had no connection with it whatsoever." He was simply never asked these questions.

Examination of Steve Rubin

Steve Rubin was the chief prosecution witness. Essentially through his testimony the government hoped to prove its case. If the jury found Rubin incredible, there was no chance of a conviction.

In addition to the improper leading of Rubin at almost each critical point in his testimony (e.g., Tr. 65, 136, 139, 141, 142, 245), the prosecutor was permitted to ask the following question over a continuing defense objection:

> Q At the time, Mr. Rubin, that you, your attorney, Mr. Adlick, and I had a conversation, didn't I tell your attorney and yourself that the Government and I knew of no such -- did not, did not know of any wrongdoing on your part by merely selling a horse to Forrest Gerry? (Tr. 248)

Not only was the prosecutor thereby testifying as to the credibility of Rubin, but he was also stating, as the very premise for the question, that the "horse" (Joli Timmy) was sold to Forrest Gerry. This, of course, was a primary factual question for the jury to decide.

Closing Argument

The government's summation was most improper. The prosecutor repeatedly made statements of personal opinion as to Mr. Bonacorso's guilt, accused Mr. Bonacorso of crimes not charged in the indictment, and misstated the record. In spite of the trial court's efforts at blunting the prejudicial effect of the summation through repeated instructions (A-125, A-196, A-202, A-211; Tr. 506), it cannot fairly be said that this impropriety was not a factor in this otherwise extremely weak case.[21/] Berger v. United States, 295 U.S. 78, 84-89 (1935); United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958); United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); United States v.

21/ Defense counsel interrupted the government's summation on two occasions to object to the prosecutor's comments (A-478, A-488), and eventually moved for a mistrial (Tr. 509).

Perisco, 305 F.2d 534 (2d Cir. 1962).

Because virtually every page of the transcript of the prosecutor's summation bristles with prejudicial remarks, we hesitate to isolate particular comments. The following, however, are two examples of misstatements of the record, perhaps not immediately recognizable as such, which were most prejudicial.

We have previously made reference to the fact that never during his grand jury testimony was Joseph Bonacorsa's attention directed to both Forrest Gerry, Jr. and the horse Joli Timmy at the same time, and that the prosecutor inaccurately gave the contrary impression during his opening statement. This was repeated several times during the summation (A-461, 477, 481, 486, 487).

Also particularly prejudicial was the following misstatement of the record:

> * * * He [Steve Rubin] even backed up on direct examination, he said yes, keep to the story, and if you remember Mr. Costellano [defense counsel] examined him about the word, and he said, why shouldn't he -- he said, "Yes, those are his exact words." (A-467)

The prosecutor was making reference to Rubin's testimony as to what Joseph Bonacorsa allegedly told him when the bill of sale was delivered. (The government's proof of the first obstruction of justice charge.) Not only did Rubin never

say "Yes, those are his exact words" during cross-examination, but during re-direct, Rubin stated (in response to the prosecutor's leading question):

> No, he didn't, he didn't use that terminology, I don't remember him using that terminology. He made a statement, but I can't remember it.22/ (Tr. 245)

CONCLUSION

Even if viewed under the brightest of lights most favorable to the government, the evidence at trial failed to establish that Joseph Bonacorsa knowingly testified falsely before the grand jury, or corruptly endeavored to obstruct the administration of justice. For this reason, as well as the material variance between the pleading and proof, the overreaching of the prosecutor throughout the proceedings, and a series of substantial errors which plagued the relatively brief trial, the judgment of conviction should be reversed, and the indictment dismissed.

22/ This misstatement of the record was particularly prejudicial because during the second day of its deliberations the jury asked for the testimony of Steve Rubin (Tr. 628). They were read only the direct examination, however, and thus did not hear the above portion of Rubin's testimony, where he essentially recanted what he said on direct concerning this most critical point. (Compare Tr. 141-142 with Tr. 244-245).

Respectfully submitted,

ROTHBLATT, ROTHBLATT, SEIJAS
& PESKIN
Attorneys for Appellant
232 West End Avenue
New York, N. Y. 10023
(212) 787-7001

JON G. ROTHBLATT
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60 RD MASPETH, N.Y.

That on the 12 day of SEPTEMBER, 1975, deponent personally served the within BRIEF FOR DEFENDANT-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SHIRLEY BACCUS-LOBEL
c/o THEODORE GILINSKY
P.O. BOX 899
BEN FRANKLIN STATION
WASHINGTON, D.C. 20044

Robert La Grassa

Sworn to before me this
12 day of September, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

INDEX